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The Impact of Gender on Clinical Negotiating Achievement

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I. INTRODUCTION

Imagine a spectrum with two images at either extreme. At one end sits the image of Woman, embodying qualities associated with generations of women who themselves had little hand in shaping the image. She lacks public power. She serves other people. She is expected to be and often succeeds in being caring, empathetic, cooperative, and generous. At the opposite end stands the figure of Lawyer, as molded by previous generations of men. He is powerful, instrumental, and adversarial.¹

During the past twenty-five years, there has been a substantial increase in the number of women entering the legal profession. In 1964, 4 percent of law students were female.² As recently as 1970, women constituted only 4.7 percent of legal practitioners.³ By the late 1980's, women comprised 41 percent of law students⁴ and 16 percent of practicing attorneys.⁵ Despite the significant increase in the number of female lawyers, many individuals continue to believe that male and female practitioners behave differently. They think that gender differences render women less effective in highly

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1. Weiss & Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1314 (1988).

2. See K. MORELLO, *THE INVISIBLE BAR* 248 (1986).

3. See C. EPSTEIN, *WOMEN IN LAW* 4-5 & Table I.1 (1981).

4. *A Review of Legal Education in the United States: Fall, 1986 Law Schools and Bar Admission Requirements*, 1987 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO B. 66.

5. See Leff, *Firms of Endearment*, SAVVY, May 1986, at 47.

competitive encounters. Consequently, these individuals suspect that female attorneys are less successful negotiators than their male counterparts.

This Article will empirically compare the results achieved by male and female students in clinical negotiation exercises. It will initially examine the perceived differences between male and female behavior. Statistically established distinctions relevant to negotiation interactions will be explored, and unsupportable stereotypes will be discussed. Comparisons will be made concerning the manner in which men and women deal with the stress of highly competitive situations.

A statistical comparison will then be made between the results achieved by male and female students during the past sixteen years in the negotiation exercises employed in my Legal Negotiating course. Despite the fact that stereotypical beliefs would suggest that women would not be as effective as their male cohorts in such competitive encounters, my anecdotal experiences have not disclosed any apparent differences regarding the results attained by male and female students. I have thus hypothesized that I would find no statistically significant difference between the settlements achieved by the men and women in my Legal Negotiating course. This null hypothesis includes two critical components. First, that the average results obtained by male and female students would be approximately equal. Second, that there would be no evidence to suggest that male negotiators have employed a more competitive approach that might produce similar means, but more skewed results.

II. REAL AND PERCEIVED GENDER DIFFERENCES

Men and women are usually perceived as being quite different, with these role expectations creating gender-based stereotypes.⁶

Generally, men are described by a series of traits that reflect competence, rationality, and assertiveness. Men, for example, are viewed as independent, objective, active, competitive, adventurous, self-confident, and ambitious. Women are seen as possessing the opposite of each of these traits. They are characterized as dependent, subjective, passive, not competitive, not adventurous, not self-confident, and not ambitious.⁷

6. See Burrell, Donohue & Allen, *Gender-Based Perceptual Biases in Mediation*, 15 COMM. RES. 447, 453 (1988); Nadler & Nadler, *The Role of Sex in Organizational Negotiation Ability*, 9 WOMEN'S STUD. COMM. 1, 1-2 (1986).

7. K. DEAUX, *THE BEHAVIOR OF WOMEN AND MEN* 13 (1976). See also Pruitt, Carnevale, Forcey & Van Slyck, *Gender Effects in Negotiation: Constituent Surveillance and Contentious Behavior*, 22 J. EXPERIMENTAL SOC. PSYCHOLOGY 264, 265 (1986); Payton, *Releasing Excellence: Erasing Gender Zoning From the Legal Mind*, 18 IND. L. REV. 629, 633 (1985).

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Men are thought to be rational and logical, while women are considered emotional and intuitive.⁸ Men are expected to emphasize objective factors, with women focusing upon relationships.⁹ As a result, men are considered more likely to define issues in abstract terms, and to resolve them through application of reasoning based upon justice and rights.¹⁰ Men are thought more likely to rely upon legal principles than are women.¹¹

Men are expected to be dominant and authoritative, while women are viewed as passive and submissive.¹² When the sexes interact, men tend to speak for longer periods and to interrupt more frequently than women.¹³ Men usually exert more control over the subjects being discussed.¹⁴ This masculine tendency to dominate male-female interactions could provide men with an inherent advantage during negotiations by enabling them to control the agenda and direct the discussions.

When Hanisch and Carnevale studied the mediative styles of male and female subjects, they found that men were more confident of their ability to influence the negotiators.¹⁵ Female mediators sent fewer verbal signals to the negotiators, and they evidenced a greater desire to obtain the approval of the involved parties.¹⁶ Professor Gilligan has suggested that perceived gender differences may be attributed to the fact that American women have historically felt less powerful than their male cohorts.¹⁷ This phenomenon has often caused women to be less confident regarding their ability to influence

8. See Payton, *supra* note 7, at 633.

9. See generally C. GILLIGAN, IN A DIFFERENT VOICE (1982).

10. Special Project, *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209, 1227 (1988) [hereinafter *Gender and Law Project*].

11. *Id.*

12. See Payton, *supra* note 7, at 633; E. MACCOBY & C. JACKLIN, *THE PSYCHOLOGY OF SEX DIFFERENCES* 228, 234 (1974).

13. See *Gender and Law Project*, *supra* note 10, at 1220; K. DEAUX, *supra* note 7, at 60.

14. *Id.*

15. See Hanisch & Carnevale, *Gender Differences in Mediator Behavior* 7 (Aug. 29, 1987) (paper published by Educational Resources Informational Center, Index No. 292-037).

16. *Id.*

17. C. GILLIGAN, *supra* note 9, at 14-16.

others¹⁸ and more concerned with the manner in which others view their performance.¹⁹

Male and female self-concepts are affected by the stereotypical way in which others view their performance. When men are successful, their performance tends to be attributed to intrinsic factors such as intelligence and hard work.²⁰ When women are successful, however, their performance is usually attributed to extrinsic variables such as luck or the actions of others.²¹ This phenomenon enhances male self-confidence by permitting them to accept credit for their achievements, and it undermines the confidence of successful women by attributing their accomplishments to external considerations.

When men and women encounter competition, they may behave differently. It has been suggested that "women are more likely [than men] to avoid competitive situations, less likely to acknowledge competitive wishes, and not likely to do as well in competition."²² Many women are apprehensive regarding the negative consequences that they associate with competitive achievement. "Again and again women report the feeling that a successful woman alienates herself from both women and men."²³ This phenomenon may be attributed to the different acculturation process for boys and girls.

Boys have traditionally been exposed to competitive situations at an early age.²⁴ They have been encouraged to participate in little league baseball, basketball, football, soccer, and other competitive athletic endeavors. These activities introduce boys to the "thrill of victory and the agony of defeat" during their formative years.²⁵ "Traditional girls' games like jump rope and hopscotch are turn-taking games, where competition is indirect since one person's success does not necessarily signify another's failure."²⁶ While

18. See Stiver, *Work Inhibitions in Women 2* (Wellesley College 1983) (paper published by the Stone Center for Developmental Services and Studies as part of their Work in Progress Series); McIntosh, *Feeling Like a Fraud* (Wellesley College 1985) (speech presented at the April 1984 Stone Center Colloquium Series and published as part of the Work in Progress Series); Pruitt, Carnevale, Forcey & Van Slyck, *supra* note 7, at 273-74.

19. See C. GILLIGAN, *supra* note 9, at 67.

20. See K. DEAUX, *supra* note 7, at 30-32, 41.

21. See *id.*; Hall & Sandler, *The Classroom Climate: A Chilly One for Women?* 4 (Feb. 1982) (paper published by the Association of American Colleges as part of the Project on the Status and Education of Women).

22. Stiver, *supra* note 18, at 5. See also C. GILLIGAN, *supra* note 9, at 42.

23. Stiver, *supra* note 18, at 6. See also C. GILLIGAN, *supra* note 9, at 14-15.

24. See C. GILLIGAN, *supra* note 9, at 9.

25. See B. HARRAGAN, *GAMES MOTHER NEVER TAUGHT YOU* 75-78, 282 (1977).

26. C. GILLIGAN, *supra* note 9, at 10.

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directly competitive games teach boys how to resolve the disputes that inevitably arise, girls rarely have the opportunity to learn such informal adjudicative skills.²⁷ By adulthood, men are much more likely to have become accustomed to the rigors of overt competition and familiar with the application of societal rules to resolve inter-competitor controversies.

Competitive games teach boys that it is more enjoyable to win than to lose. They learn that a positive mental attitude is likely to enhance their probability of success. It is thus not surprising that college men generally exude greater confidence in problem-solving situations than college women.²⁸ Men expect to achieve more advantageous results than their female cohorts.²⁹ This factor would suggest that college males would be more successful than college females with respect to competitive interactions, such as those involving negotiating exercises. Those individuals who begin bargaining encounters with greater confidence and higher aspiration levels tend to attain more favorable agreements.³⁰

In competitive situations, males are generally expected to behave more aggressively than females. Boys usually receive parental approval for aggressive and competitive tendencies, while girls are encouraged to be passive and dependent.³¹ During interpersonal transactions, men are more likely to employ "highly intense language" to persuade others, and they tend to be more effective when utilizing this approach.³² Women, on the other hand, are more likely to use less intense language during persuasive encounters, and they are inclined to be more effective behaving in that manner.³³ Females tend to employ language containing more disclaimers than their male cohorts,³⁴ which may be perceived by the recipients as an indication of less confidence. When women eschew traditionally feminine

27. *Id.*

28. See E. MACCOBY & C. JACKLIN, *supra* note 12, at 154-58.

29. See, e.g., Grant & Sermat, *Status and Sex of Other as Determinants of Behavior in a Mixed-Motive Game*, 12 J. PERSONALITY & SOC. PSYCHOLOGY 151, 154 (1969); Nadler & Nadler, *supra* note 6, at 6-7.

30. See C. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* 36-37 (1986); C. KARRASS, *THE NEGOTIATING GAME* 17-18 (1970).

31. See J. BAER, *HOW TO BE AN ASSERTIVE (NOT AGGRESSIVE) WOMAN IN LIFE, IN LOVE, AND ON THE JOB* 11-12 (1976).

32. See Burgoon, Dillard & Doran, *Friendly or Unfriendly Persuasion — The Effects of Violations of Expectations by Males and Females*, 10 HUM. COMM. RES. 283, 284, 292 (1983).

33. *Id.*

34. See Smeltzer & Watson, *Gender Differences in Verbal Communications During Negotiations*, 3 COMM. RES. REP. 74, 78 (1986).

conduct and behave in a stereotypically masculine fashion, they are usually not rewarded. They are instead criticized for deviating from conventional male-female role expectations.³⁵

When men negotiate, they generally endeavor to maximize their return, while women are inclined to emphasize the maintenance of relationships.³⁶ This phenomenon may explain why women tend to employ more accommodating strategies than men in resolving conflicts.³⁷ One might expect that the tendency of men to seek maximum results and the inclination of women to resort to accommodating behavior would provide men with an advantage during bargaining transactions.

Empirical evidence indicates that women are not as effective at deception.³⁸ Studies have shown that men are more comfortable in situations in which they are expected to dissemble,³⁹ and they find it easier to behave in a Machiavellian manner.⁴⁰ These factors should further benefit male negotiators, since individuals involved in the legal negotiation process are usually endeavoring to mislead their opponents.

On the one hand the negotiator must be fair and truthful; on the other he must mislead his opponent. Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in a variety of ways he must facilitate his opponent's inaccurate assessment. The critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not to be misled.⁴¹

Despite the various factors that would support the theory that male negotiators would achieve more beneficial results than female negotiators, empirical studies involving competitive interactions do not consistently

35. See Mayo & Henley, *Nonverbal Behavior: Barrier or Agent for Sex Role Change?*, in GENDER AND NONVERBAL BEHAVIOR 3, 8 (C. Mayo & N. Henley eds. 1981).

36. See Berryman-Fink & Brunner, *The Effects of Sex of Source and Target on Interpersonal Conflict Management Styles*, 53 S. SPEECH COMM. J. 38, 44 (1987); Komorita, *Cooperative Choice in a Prisoner's Dilemma Game*, 2 J. PERSONALITY & SOC. PSYCHOLOGY 741, 744 (1965).

37. See Turner & Henzl, *Language Utilized in Rationalizing Conflict Decisions: Is There a Different Voice?* 1 (1982) (paper published by Educational Resource Information Center, Index No. 260-467).

38. See Benton, Gelber, Kelley & Liebling, *Reactions to Various Degrees of Deceit in a Mixed-Motive Relationship*, 12 J. PERSONALITY & SOC. PSYCHOLOGY 170, 179 (1969).

39. See Tedeschi, Lindskold, Horai & Gahagan, *Social Power and the Credibility of Promises*, 13 J. PERSONALITY & SOC. PSYCHOLOGY 253, 258 (1969).

40. See E. MACCOBY & C. JACKLIN, *supra* note 12, at 260.

41. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. BAR FOUND. RES. J. 926, 927 (1980).

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substantiate this supposition. Psychologists endeavoring to measure male-female differences during competitive encounters most frequently employ variations of the "Prisoner's Dilemma" exercise. The most basic formulation involves two participants who simultaneously select option A or option B, for a possible reward of 1, 5, or 10 points.⁴² Each party's result depends on the interaction between their choice and the option selected by their opponent (see diagram).⁴³

		Player 1	
		A	B
Player 2	A	5, 5 AA	10, 1 BA
	B	1, 10 AB	1, 1 BB

A/A is the cooperative choice, since this combination permits both participants to maximize their joint gain over repeated trials. Either person may "defect" and select "B" hoping to obtain a reward of 10, compared to their opponent's 1. The party's short-term benefit is likely to be offset by the fact that the other participant will probably respond by shifting from "A" to "B" to minimize his or her future exposure. Cooperative behavior ensures a diminished, but safer, return for both.

Based upon the stereotypical belief that men are more competitive than women, one might reasonably expect men to behave more competitively when participating in the Prisoner's Dilemma game. Men would be more likely to establish higher aspiration levels,⁴⁴ and they would probably endeavor to take advantage of the perceived feminine trait of accommodation.⁴⁵ The various Prisoner's Dilemma studies have, however, discerned little or no gender differences.⁴⁶ Many of the cited studies found no statistically significant gender difference concerning competitive tendencies. Of those experiments that did discern different behavior, some found males to be more competitive

42. See E. MACCOBY & C. JACKLIN, *supra* note 12, at 249.

43. *Id.*

44. See *supra* note 29 and accompanying text.

45. See *supra* note 36 and accompanying text.

46. See E. MACCOBY & C. JACKLIN, *supra* note 12, at 249-51 & Table 7.2.

and some found females to be more competitive.⁴⁷ Almost identical findings were obtained with respect to cooperative behavior. Most studies discovered no difference based upon participant gender, while others obtained mixed results.⁴⁸

Various factors might explain why the anticipated gender differences did not materialize. In their study, Grant and Sermat found that women could be both more cooperative and more competitive, without being submissive.⁴⁹ Furthermore, when men and women interact in a competitive environment, men occasionally make the mistake of assuming that the women will not be as competitive.⁵⁰ Men who make assumptions based on this stereotype simply provide the female participants with an inherent advantage. In addition, women who encounter men in competitive environments often work more diligently to achieve optimal results.⁵¹ "It is as if the men [are] 'brought down' by the women and the women [are] 'brought up' by the men."⁵²

Other important gender differences occur when men and women interact in competitive settings. Although women tend to employ less powerful language when they are in less powerful roles, they utilize forceful language when they are in a position of equality.⁵³ During most of the Prisoner's Dilemma studies, the male and female participants were placed in positions of relative equality.

Another factor that may explain the lack of gender differences is the role of education. "When individuals are trained to perform a specific role, gender communication-behavior differences disappear."⁵⁴ Highly educated professionals exhibit a similar trend, with women adopting a more masculine

47. See *id.* at 251-53 & Table 7.3.

48. See *id.*

49. See Grant & Sermat, *supra* note 29, at 156.

50. See C. CRAVER, *supra* note 30, at 162.

51. See Bedell & Sistrunk, *Power, Opportunity Costs, and Sex in a Mixed-Motive Game*, 25 J. PERSONALITY & SOC. PSYCHOLOGY 219, 225 (1973). See also Leung & Lind, *Procedural Justice and Culture: Effects of Culture, Gender, and Investigator Status on Procedural Preferences*, 50 J. PERSONALITY & SOC. PSYCHOLOGY 1134, 1138 (1986) (males more competitive against other males than against females).

52. Rapoport & Chammah, *Sex Differences in Factors Contributing to the Level of Cooperation in the Prisoner's Dilemma Game*, 2 J. PERSONALITY & SOC. PSYCHOLOGY 831, 835 (1965).

53. See Burrell, Donohue & Allen, *supra* note 6, at 453.

54. *Id.* at 464.

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style of communication.⁵⁵ These findings would suggest that if professionals are trained in mediating or negotiating skills, gender-based communication differences would be minimized. This would not, however, guarantee that male and female subjects would be viewed identically even when they behave similarly. Male-female stereotypes could still cause many observers to perceive women participants as less controlling and less influential than male participants, even in settings in which the women were objectively exhibiting dominant behavior.⁵⁶

One might reasonably expect gender-based communication stereotypes to place women at a disadvantage in legal negotiation exercises.⁵⁷ They would be perceived as less dominant and thus less forceful.⁵⁸ They would be expected to be less logical and more emotional.⁵⁹ Nonetheless, two important factors counterbalance these stereotypes. The advanced education possessed by law students and the specific training received in a legal negotiating course would minimize the gender-based communication differentials.⁶⁰ The female negotiators may also benefit from the established fact that women are typically more sensitive to nonverbal messages than their male cohorts.⁶¹ Since a significant amount of critical communication during interpersonal transactions is nonverbal,⁶² the enhanced ability of female negotiators to decode such signals could offset any disadvantage associated with latent stereotyping.

Professor Deaux succinctly recognized that behavioral predictions based upon stereotypical beliefs regarding men and women are likely to be of questionable validity in most settings.

[D]espite the persistence of stereotypes, the studies of social behavior suggest that there are relatively few characteristics in which men and women consistently differ. Men and women both seem to be capable of being aggressive, helpful, and alternately cooperative and competitive. In other

55. See Smeltzer & Watson, *supra* note 34, at 75, 77-78.

56. See Burrell, Donohue & Allen, *supra* note 6, at 463.

57. See Nadler & Nadler, *supra* note 6, at 2.

58. See *supra* notes 12-14 and accompanying text.

59. See *supra* notes 8-11.

60. See *supra* notes 54-55 and accompanying text.

61. See J. HALL, NONVERBAL SEX DIFFERENCES: COMMUNICATION, ACCURACY AND EXPRESSIVE STYLE 15-17, 27 (1984); Mayo & Henley, *Nonverbal Behavior: Barrier or Agent for Sex Role Change?*, in GENDER AND NONVERBAL BEHAVIOR 3, 7 (C. Mayo & N. Henley eds. 1981); N. HENLEY, BODY POLITICS: POWER, SEX, AND NONVERBAL COMMUNICATION 13-15 (1977).

62. See generally H. EDWARDS & J. WHITE, THE LAWYER AS A NEGOTIATOR 152-58 (1977).

words, there is little evidence that the nature of women and men is so inherently different that we are justified in making stereotyped generalizations.⁶³

If Professor Deaux's assessment is correct, one should not expect to find any statistically significant difference between the results achieved by men and women in clinical negotiating exercises.

III. CLINICAL NEGOTIATING COURSE METHODOLOGY

Since the vast majority of legal problems are resolved by negotiated agreements, instead of adjudicative decisions, the development of bargaining skills should substantially enhance one's ability to practice law. During the 1960's, innovative law professors began to recognize that simulated exercises could be employed in clinical courses to teach students about the negotiation process. James J. White at the University of Michigan⁶⁴ and Cornelius J. Peck and Robert L. Fletcher at the University of Washington⁶⁵ developed simulation models designed to improve the bargaining competence of future legal practitioners.

Since 1973, I have regularly taught a Legal Negotiating course based upon the White-Peck-Fletcher models. During the first half of the semester, the class explores theoretical and practical concepts pertaining to the negotiation process. Prior to 1986, students were assigned readings from *The Lawyer as a Negotiator*.⁶⁶ Since 1986, they have been assigned *Effective Legal Negotiation and Settlement*.⁶⁷ The impact of verbal and nonverbal communication and psychological factors upon the negotiation process is studied. The manner in which the personal needs of the clients and attorneys and the different types of legal problems and relationships involved influence the bargaining transaction is discussed. The various phases of the negotiation process are examined, along with the different techniques that negotiators are likely to encounter. The way in which cultural differences and gender role expectations affect bargaining relationships is also considered. Specific issues pertaining to such topics as the commencement of litigation settlement

63. K. DEAUX, *supra* note 7, at 144.

64. See White, *The Lawyer as a Negotiator: An Adventure in Understanding and Teaching the Art of Negotiation*, 19 J. LEGAL EDUC. 337 (1967). See also H. EDWARDS & J. WHITE, *supra* note 62.

65. See Peck & Fletcher, *A Course in the Subject of Negotiation*, 21 J. LEGAL EDUC. 196 (1968). See also C. PECK, *CASES AND MATERIALS ON NEGOTIATION* (1980).

66. H. EDWARDS & J. WHITE, *supra* note 62.

67. C. CRAVER, *supra* note 30.

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discussions, judicial settlement conferences, telephone negotiations, and the enhancement of seemingly weak positions are examined.

While the negotiation process is being formally explored, the students are required to engage in three or four negotiation exercises. The class is divided into groups of two or four. The groups are each instructed to seek a negotiated resolution of an identical legal problem. At the conclusion of each exercise, the various results are disclosed and individual negotiations are evaluated in an effort to determine which techniques were successfully and unsuccessfully employed. I endeavor to integrate the theoretical concepts with the students' simulated experiences.

During the second half of the semester, class members engage in five negotiation exercises which count towards two-thirds of their course grade. Each problem is structured in a duplicate bridge format. Everyone receives the same "General Information" describing the specific dispute that needs to be resolved. All of the individuals on the same side are provided with the identical "Confidential Information" apprising them of their client's goals and the manner in which they will be evaluated if they achieve a settlement or fail to do so. Each side consists of two students, in an effort to demonstrate that lawyers must not only negotiate with their opponents, but also with their own clients.⁶⁸ For each exercise, participants are randomly assigned different partners and different opponents. The results of each exercise are rank-ordered from high to low for each side based upon the team's results measured against the confidential scoring information provided prior to the exercise. This ordering scheme is used to grade each team's performance.⁶⁹ In an effort to induce students to focus on the impact of theoretical concepts upon their negotiating exercises, each student is required to prepare a twelve to fifteen page paper exploring this interrelationship. This paper accounts for one-third of the course grade.

The environment in my Legal Negotiating class is highly competitive. Each group is evaluated solely by its performance vis-a-vis the other groups representing the same side of the problem. Although opposing parties are encouraged to maximize their joint return through cooperative bargaining, they realize that it is their own respective point totals that will determine their group placement and, ultimately, their individual grades. The class members

68. It is ironic that the only physical confrontation of which I am aware did not involve opponents -- but partners! One became extremely agitated and grabbed his partner. Fortunately, their opponents were able to separate them before any real injury was inflicted.

69. Carefully developed non-zero sum exercises, which permit negotiating parties simultaneously to increase their respective satisfaction levels through appropriate trade-offs, are designed to encourage resort to cooperative bargaining that will enable participants to maximize the combined return for both sides. However, only the respective point totals achieved for each side are utilized to determine the final rankings, since it is that particular result which is most relevant to each party's own client.

are usually second semester, third-year students. I frequently remind them that if they consider the pressure generated by this course to be high, they should contemplate their reaction to situations in which their clients' money or freedom will be involved.

At the beginning of this research project, I discussed my work with Dr. Peggy McIntosh of the Wellesley College Center for Research on Women. She appropriately noted that my course evaluation structure reflected the mores indigenous to the white, male-dominated legal profession.⁷⁰ Dr. McIntosh suggested that the model might be different if it had been developed by women or minorities. She further indicated that my statistical assessment could not determine whether my former male and female students employed identical negotiation styles.

Over the past fifteen years, I have made presentations on legal negotiating to numerous attorneys in thirty states, Washington, D.C., Canada, and the People's Republic of China. Many practitioners, particularly older men, have asked whether female negotiators can be as effective as their male cohorts. These attorneys have often cited the stereotypical assumptions that females will not be as aggressive or competitive as males. I have generally responded with my overall impression that men and women students appear to achieve similar outcomes in my Legal Negotiating course.

This study is not being conducted to demonstrate that men and women behave identically in negotiations. It is being carried out to determine whether, once the evaluative criteria are defined, male and female students are able to obtain similar results. While I recognize that the men and women in my course may occasionally employ gender-specific styles, these differences may not necessarily generate different outcomes. As Professor MacKinnon has observed from a feminist perspective: "In academic and professional areas, it's: you define what merit is, we will meet it."⁷¹

IV. STATISTICAL FINDINGS

My database included fifteen Legal Negotiating classes at five different law schools.⁷² Since I was comparing male and female clinical negotiating achievement, only the student negotiation exercise placements were used.

70. See Payton, *supra* note 7, at 641.

71. MacKinnon, *Feminist Discourse, Moral Values, and the Law -- A Conversation*, 34 BUFFALO L. REV. 11, 22 (1985).

72. University of California, Berkeley [UCB] (1973); University of Virginia [UVA] (1976); University of California, Davis [UCD] (1977-spring 1982); University of Illinois [UI] (fall 1982-spring 1986); and George Washington University [GWU] (fall 1986-1989).

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The means and standard deviations were calculated for males and females in each of the fifteen classes. A t-test was then performed for each class to determine if there was a statistically significant difference between the male and female means for any class. T-probability values of 0.10 or lower would establish statistical significance at the 0.10 level, while t-probability values of 0.05 or lower would demonstrate significance at the 0.05 level.⁷³ Since I hypothesized that no statistically significant difference would be found and had no reason to suspect that if any difference was found it would favor males or females, two-tailed t-probability values were employed.⁷⁴ The relevant data are set forth in Table 1.

A perusal of the means set forth in Table 1 suggests no difference based upon the gender of the negotiators. For seven classes,⁷⁵ the means for the male students were slightly higher than the means for the female students, while the female means were somewhat above the male means with respect to the other eight classes.⁷⁶ A review of the t-probability values further demonstrates the absence of any statistically significant gender-based difference. No statistically significant difference was found at the 0.05 level for any class. A significant difference was only ascertained for one class (1981) at the 0.10 level.⁷⁷ These findings would strongly suggest that there is no correlation between gender and clinical negotiating achievement.

As the number of female law students increased during the 1970's and early 1980's, one might wonder whether women students became more competitive as they became acculturated to the traditional, male-dominated law school environment. This phenomenon might be suspected, for example, if the data indicated that female means rose vis-a-vis male means with the

73. At the 0.10 level of significance, the probability that the determined difference has occurred by random chance would be one in ten, while at the 0.05 level it would be one in twenty. See M. DeGROOT, S. FIENBERG & J. KADANE, *STATISTICS AND THE LAW* 10-13 (1986); D. BARNES & J. CONLEY, *STATISTICAL EVIDENCE IN LITIGATION* 306-08 (1986).

74. See M. DeGROOT, S. FIENBERG & J. KADANE, *supra* note 73, at 13-15; D. BARNES & J. CONLEY, *supra* note 73, at 305-06.

75. 1976, 1979, S1982, 1983, S1986, 1989, and 1990.

76. 1973, 1977, 1980, 1981, F1982, 1985, F1986, and 1988.

77. It is interesting to note that the 1981 difference was in favor of the female negotiators.

Table 1

T-Test Comparisons of Gender-Based Means

Year (School)*N		Mean	Std. Dev.	D.F.	T-Prob.
<hr/>					
1973 (UCB)				38.0	0.6054
Males	30	27.25000	7.08659		
Females	10	28.55000	5.94161		
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1976 (UVA)				34.0	0.2788
Males	33	28.75152	5.39451		
Females	3	25.16667	5.50757		
<hr/>					
1977 (UCD)				29.0	0.7921
Males	16	22.45625	5.08697		
Females	15	22.90000	4.11096		
<hr/>					
1979 (UCD)				21.8	0.6038
Males	15	20.40000	5.22084		
Females	13	19.58462	2.74829		
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1980 (UCD)				29.0	0.7794
Males	18	22.40556	6.88361		
Females	13	23.03846	4.93061		
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1981 (UCD)				17.9	0.0899
Males	13	18.57692	2.46514		
Females	13	21.26923	4.82016		
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S1982 (UCD)				29.0	0.5392
Males	21	23.01905	5.01972		
Females	10	21.85000	4.61309		
<hr/>					
F1982 (UI)				27.0	0.8960
Males	24	19.90833	4.54321		
Females	5	20.20000	4.20714		

IMPACT OF GENDER ON NEGOTIATING

Year (School)*N		Mean	Std. Dev.	D.F.	T-Prob.
1983 (UI)				43.0	0.1739
Males	29	31.90690	7.81879		
Females	16	28.53750	7.83461		
1985 (UI)				44.0	0.9226
Males	33	30.01818	8.47763		
Females	13	30.26923	5.82958		
S1986 (UI)				41.0	0.8302
Males	29	30.49310	6.55509		
Females	14	30.00714	7.64153		
F1986 (GWU)				43.0	0.6845
Males	22	29.54545	6.79970		
Females	23	30.47826	8.37268		
1988 (GWU)				53.0	0.9629
Males	37	38.66757	8.86093		
Females	18	38.78889	9.39618		
1989 (GWU)				56.0	0.7739
Males	34	41.23235	10.94395		
Females	24	40.40000	10.62614		
1990 (GWU)				57.0	0.2167
Males	31	42.06129	11.00926		
Females	28	38.44643	11.19836		

* UCB = University of California, Berkeley; UVA = University of Virginia; UCD = University of California, Davis; UI = University of Illinois; GWU = George Washington University.

S = spring term

F = fall term

passage of time. An examination of the data shows no such trend. The female means exceeded the male means for 1973, 1977, 1980, and 1981, while the male means were higher in 1976, 1979, and S1982.

Although the t-test calculations failed to establish a statistically significant difference between the average results achieved by male and female negotiators, it is possible that the actual results obtained by men were different from those attained by women. For example, if the men were more competitive, their results might have been more skewed than those of the women. Competitive men might have endeavored to obtain total "victory" and been forced to accept complete "defeat" (*i.e.*, a nonsettlement) if they were unable to attain their ultimate objective. The more accommodating females, on the other hand, would have tended to cluster around the mean.

If the male results were more skewed than the female results, the male standard deviations would be substantially higher than the female standard deviations.⁷⁸ A review of the different standard deviations does not reveal any skewing. For most classes, the male and female standard deviations are approximately equal. Furthermore, while the male standard deviations were higher for eight classes,⁷⁹ the female standard deviations were higher for the other seven classes.⁸⁰ These figures would warrant rejection of the theory that men are more likely to behave in a "win-lose" competitive manner while women are more likely to act in a "win-win" cooperative fashion.

V. DISCUSSION OF FINDINGS

During the past sixteen years, I have discovered that practitioners and law students of both sexes permit gender-based stereotypes to influence their negotiating interactions with persons of the opposite gender and people of the same gender. Many individuals assume that men will be highly competitive negotiators who will always endeavor to achieve maximum results. Women negotiators, on the other hand, are expected to be more accommodating and less competitive.

On those occasions in my Legal Negotiating class when two women have been paired against two other women, they have often permitted stereotypical beliefs to affect their transaction. They have regularly expressed the preliminary view that their interaction would be more pleasant, due to the absence of the overt "win-lose" competitiveness that they attribute to their male classmates. Once their bargaining encounters have commenced, however, they have generally been as competitive as the men.

78. See D. BARNES & J. CONLEY, *supra* note 73, at 127-29.

79. 1973, 1977, 1979, 1980, S1982, F1982, 1985, and 1989.

80. 1976, 1981, 1983, S1986, F1986, 1988, and 1990.

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This empirical study was undertaken to test the validity of practitioner and student assumptions regarding the impact of gender upon negotiation results. Based upon my previous course observations, I hypothesized that there was no difference with respect to the negotiation outcomes obtained by male and female negotiators. The fifteen years of data warrant acceptance of the null hypothesis. The t-test calculations disclosed no statistically significant difference between the mean results achieved by male and female negotiators.⁸¹ A review of the standard deviations pertaining to each class failed to show that male students achieved skewed results. This would negate the stereotypical belief that men are more competitive "win-lose" negotiators than their female cohorts.

The absence of any statistically significant difference between the results attained by male and female students in my Legal Negotiating course exercises should not be surprising. Law students are a self-selecting group of highly intelligent and highly competitive individuals.⁸² It is thus possible that an analogous study of the results achieved by undergraduate or high school students on clinical negotiating exercises might indicate the influence of gender-based differences.

It would be beneficial for legal negotiating professors at other law schools to engage in similar research to determine whether they would find any statistically significant gender differences. It would also be informative for professors of other clinical skills courses, such as trial practice, mediation, and client counseling, to compare the performances of their students to ascertain the presence or absence of any gender-based distinctions.

Legal negotiating professors should examine our own gender-based stereotypical beliefs to ensure that we are not subconsciously encouraging male and female students to behave differently. We should be careful not to permit individuals to suggest that women cannot achieve substantive results as favorable as those attained by men.

Legal practitioners must acknowledge the impact that gender-based stereotypes may exert upon negotiating interactions. Male attorneys who believe that female lawyers will not be as competitive or Machiavellian as

81. My teaching experience would warrant a similar null hypothesis with respect to the results achieved by minority and nonminority students. Although the number of minority participants in my Legal Negotiating classes was too low to permit statistically significant comparisons to be made, I should note that the mean results attained by minority students at the highly diverse University of California, Davis (1977, 1979, 1980, 1981, and S1982) were approximately equal to those obtained by nonminority students.

82. One might question whether the results achieved in my Legal Negotiating course would be representative of the results that would be attained by all law students, based upon the premise that those individuals who select my course do not constitute a truly representative sample. Two to three times as many students generally seek admission to my limited enrollment class, with the persons admitted being selected randomly. There is thus no reason to suspect that my Legal Negotiating students are not representative of all law students.

their male cohorts will simply provide women opponents with an inherent advantage. Female lawyers must also eschew reliance upon such stereotypical opinions with respect to both their male and female opponents. Women practitioners who conclude that adversaries are treating them lightly because of their gender should not hesitate to take advantage of the situation. Their favorable outcomes will teach their chauvinistic opponents a lesson, while simultaneously benefiting their own clients.

VI. CONCLUSION

Fifteen years of empirical data have demonstrated the absence of any statistically significant difference between the clinical negotiating results achieved by male and female law students. This finding should induce students, teachers, and practitioners to reassess the validity of their stereotypical beliefs concerning the behavior of men and women attorneys in competitive interactions. There is simply no reason to suspect that female lawyers cannot attain outcomes as beneficial as those obtained by their male counterparts in any bargaining setting.

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